

OFFICIAL FILE  
ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

ORIGINAL  
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CHIEF CLERK'S OFFICE  
07-0511

Steven B. Pollack )

v )

Commonwealth Edison Company )

Complaint as to billing

**COMPLAINANTS OPPOSITION  
TO RESPONDENT'S MOTION TO DISMISS**

Now comes Complainant, Steven B. Pollack, on his own behalf and asks the Administrative Law Judge and Illinois Commerce Commission to deny Commonwealth Edison's motion to dismiss his complaint because the Commission does have authority to enforce a mandate in the Public Utilities Act itself and second because respondent improperly argued its case in chief without complainant having the benefit of discovery.

Commonwealth Edison first argues that Pollack failed to state a claim upon which relief can be granted because he claims rights under a provision of the Public Utilities Act upon which the Illinois Commerce Commission has apparently not promulgated more specific rules. Commonwealth Edison cites no case law or statutory provision for its proposition that the Legislature's clear language in its Act can be ignored if the executive agency charged with implementing the Act does not create more specific rules.

This misstates the law and the relationship between legislative and executive functions. The legislature creates the law through its Acts. The executive agency executes the Act and is sometimes delegated authority to create more specific rules to fill in legislative ambiguity. The absence of agency rulemaking on a particular subject addressed by the Act does not remove jurisdiction for the agency to hear a complaint based on the Act. It just means that the tribunal will look to the Act's language to guide its decision.

**Power of the Commission**

In defining the subject matter of the Commission, the Act provides:

The Commission, or any commissioner or hearing examiner designated by the Commission, *shall have power* to hold investigations, inquiries and hearings *concerning any matters covered by the provisions of this*

Act, or by any other Acts relating to public utilities subject to such rules and regulations as the Commission may establish.

(emphasis added)(220 ILCS 5/10-101) (from Ch. 111 2/3, par. 10-101)

In defining the breadth of the Commerce Commission's power, the Act provides:

The Commerce Commission shall have *general supervision* of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the *manner and method* in which the business is conducted.

(emphasis added)(220 ILCS 5/4-101) (from Ch. 111 2/3, par. 4-101)

In defining the appropriate subject of a complaint, the Act provides:

Complaint may be made...by any person...in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission.

(220 ILCS 5/10-108) (from Ch. 111 2/3, par. 10-108)

The statute therefore clearly gives the Commission the power to adjudicate complaints under the Act itself apart from rules promulgated by the Commission.

According to the Illinois Supreme Court, “[u]nder the Act, the Commission has “general supervision of all public utilities” (Ill.Rev.Stat.1987, ch. 111 2/3, par. 4-101), including Edison. In supervising the utilities, the Commission may... review the compliance of the utilities with the Act. Ill.Rev.Stat.1987, ch. 111 2/3, par. 4-101.” Business and Prof. People For the Public Interest v. The Illinois Commerce Commission, 136 Ill.2d 192, 201-02 (1990).

Notwithstanding Commonwealth Edison's unsupported position to the contrary, the Illinois Commerce Commission has general jurisdiction to hear a complaint arising directly from the language of the Act.

**Commonwealth Edison's Credit Card Policy is Both a Rule Subject to Regulation and Part of its Service Subject to Regulation**

Commonwealth Edison next contends that “how customers pay for electric service rendered by a public utility is not covered in the Illinois Public Utilities Act.” Again it offers no citation to case law or language in the Act to support its legal conclusion.

The Act states:

*All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.*

(Emphasis added)(220 ILCS 5/8-101) (from Ch. 111 2/3, par. 8-101)

Service is defined by the Act:

"Service" is used in its broadest and most inclusive sense, and includes not only the use or accommodation afforded consumers or patrons, but also any product or commodity furnished by any public utility and the plant, equipment, apparatus, appliances, property and facilities employed by, or in connection with, any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which such public utility is engaged and to the use and accommodation of the public.

(220 ILCS 5/3-115) (from Ch. 111 2/3, par. 3-115)

This broad definition of service was held by the Illinois courts to extend beyond rate disputes such that "the Public Utilities Act vests control of the extension of water service in the case at bar to the Commission." Friederich v. Illinois-American Water Co. 94 Ill.App.3d 172, 176 (1981).

Commonwealth Edison's position that its payment rules and payment services are not covered under the Public Utilities Act is wrong. Maybe it believes a policy is not a rule but that is not reasonable.

**Commonwealth Edison's Self-Serving Evidence That its Payment Policy is Reasonable Should Be Rejected at this Motion to Dismiss Proceeding**

Commonwealth Edison put forward evidence regarding its credit card policy and an affidavit that the policy is applied uniformly. Such evidence is not appropriate in a motion to dismiss where Complainant has not been afforded the opportunity to receive his requested discovery.

It would violate Complainant's due process rights for this hearing to convert a motion to dismiss into a motion for summary judgment by accepting Respondent's self-serving facts alleged as true.

The Commission should therefore refuse to make any findings on the merits of Complainants allegation that Commonwealth Edison's credit card policy violates the Public Utilities Act until Complainant has had an opportunity to receive and review relevant discovery material.

**Conclusion**

Complainant Steven B. Pollack therefore requests that Commonwealth Edison's motion to dismiss be denied.

Respectfully submitted,

  
Steven B. Pollack

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NOTICE OF FILING

Please take notice that on December 19, 2007, I filed with the Chief Clerk of the Illinois Commerce Commission Complainant's Opposition to Respondent's Motion to Dismiss, attached to this notice, a copy of which is now served upon you.



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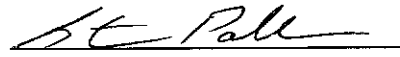
**CERTIFICATE OF SERVICE**

I hereby certify that on December 19, 2007, I served a copy of Complainant's Opposition to Respondent's Motion to Dismiss, by causing copies to be placed in the U.S. Mail, first class postage prepaid, addressed to each shown below:

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